

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

UNITED STATES OF AMERICA,

Plaintiff,

v.

ANGEL SERVIN,

Defendant.

ORDER

09-cr-80-bbc

10-cv-815-bbc

Defendant Angel Servin has filed a motion for relief from his conviction and sentence under 28 U.S.C. § 2255, challenging the gun enhancement imposed on him at sentencing and a motion for appointment of counsel. He contends that the court erred in imposing an enhancement to his guidelines under USSG §2D1.1(b)(1) when it failed to make any specific findings that the weapon was possessed during the relevant offense conduct and, even if it had made such findings, they would not have been supported by a preponderance of the evidence.

Defendant was sentenced on November 5, 2009. He did not file an appeal of his conviction. Therefore, his conviction became final 10 days after the judgment of conviction

had been entered, or approximately November 20, 2010, when his opportunity to file a direct appeal expired. Clay v. United States, 537 U.S. 522 (2003). Although the court did not receive defendant's motion until December 21, 2010, defendant says in his certificate of service that the motion was mailed on November 3, 2010. Under the mailbox rule, the document was deemed filed when delivered to the prison authorities on November 3, 2010, Houston v. Lacke, 487 U.S. 266 (1988), and therefore his motion is deemed timely.

Despite the timeliness of defendant's motion, his argument cannot be considered because he had an opportunity to raise it on direct appeal, did not take such an appeal and has failed to show cause and prejudice for his failure. It is settled law that § 2255 is not intended to be a substitute for a direct appeal. Varela v. United States, 481 F.3d 932, 935 (7th Cir. 2007). If a defendant skips his direct appeal or omits some challenges on appeal, his failure or omission is considered a waiver of his right to appeal. He can obtain post conviction judicial review of his challenge to his sentence only if he can establish "cause" for the waiver and 'actual prejudice resulting from the alleged . . . violation.'" Reed v. Farley, 512 U.S. 339, 354 (1994) (citing Wainwright v. Sykes, 433 U.S. 72, 84 (1977)). I need not consider whether defendant might have cause for not appealing because he cannot make a showing that he was prejudiced by not having his claim heard.

Even if he had appealed, defendant would not have prevailed on his challenge to his sentence because his claim does not have any merit. The investigative materials showed that

a search of defendant's residence had recovered several weapons and ammunition stored in close proximity to drugs, drug paraphernalia and large quantities of drug proceeds. Defendant also sold the confidential informant a firearm during a controlled buy and offered to sell the confidential informant another firearm during a drug transaction. The guidelines provide that a two-level enhancement is to be applied when weapons are present "unless it is clearly improbable that the weapon was connected to the offense." § 2D1.1, App. Note 3. Under the circumstances, defendant would not have been able to make this showing.

In his motion, defendant states that he did not appeal his conviction on "counsel's advice." He may be attempting to claim his counsel was ineffective. The test for constitutional ineffectiveness of counsel was established in Strickland v. Washington, 466 U.S. 668 (1984). The test has two components. The defendant must show both that counsel's representation fell below a objective standard of reasonableness, id. at 688, and that there exists a reasonable probability that the result of the proceeding would have been different had it not been for counsel's unprofessional errors. Id. at 694. In other words, proving a lawyer ineffective requires a showing that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687. Merely showing that counsel erred in a few specific respects may not be enough to show incompetence; counsel's work must be evaluated as a whole. Id. at 690; see also Peoples v. United States, 403 F.3d 844, 848 (7th Cir. 2005) ("it is the overall

deficient performance, rather than a specific failing, that constitutes” ineffectiveness). Even if a defendant can prove that his counsel was ineffective, he still must show a “reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” Strickland, 466 U.S. at 694.

Under Strickland, courts deciding post conviction motions based on inadequate representation may take up either prong of the two-prong showing that the defendant must make. “If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed.” Id. at 697.

In this instance, the two inquiries overlap. The only way in which defense counsel could be found ineffective is if the claim defendant wishes counsel had raised at sentencing would have succeeded. Otherwise, defendant was not prejudiced and there would be no basis on which to find that defense counsel’s representation fell below the minimum standard to which defendant was entitled. The arguments defendant wanted counsel to make were without merit and would not have been granted, so no harm was done and defense counsel cannot be faulted for not pursuing the claims. I conclude that defendant has shown no reason why his § 2255 motion should be granted.

Under Rule 11 of the Rules Governing Section 2255 Proceedings, the court must issue or deny a certificate of appealability when entering a final order adverse to a petitioner. To

obtain a certificate of appealability, the applicant must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); Tennard v. Dretke, 542 U.S. 274, 282 (2004). This means that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." Miller-El v. Cockrell, 537 U.S. 322, 336 (2003) (internal quotations and citations omitted).

Although the rule allows a court to ask the parties to submit arguments on whether a certificate should issue, it is not necessary to do so in this case because the question is not a close one.

ORDER

IT IS ORDERED that defendant Angel Servin's motion for post conviction relief under 28 U.S.C. § 2255 is DENIED for his failure to show that either his conviction or sentence is illegal. No certificate of appealability shall issue.

Further, IT IS ORDERED that defendant Angel Servin's motion for appointment of

counsel is DENIED.

Entered this 3d day of January, 2011.

BY THE COURT:

/s/

BARBARA B. CRABB

District Judge